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This Land is Whose Land? The Feasibility of Extraterritorial Jurisdiction in West Virginia's Land Use Planning Laws

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THIS LAND IS WHOSE LAND? THE FEASIBILITY OF EXTRATERRITORIAL JURISDICTION IN WEST VIRGINIA'S LAND USE PLANNING LAWS

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I. INTRODUCTION

Governor Joe Manchin III recently changed the state slogan to read “West Virginia, Open for Business,” illustrating the office’s dedication to increase economic development in the state.¹ The Governor’s efforts are proving

¹ Fred Pace, *Open for Business*, THE REGISTER-HERALD, Mar. 18, 2006, http://www.register-herald.com/business/local_story_077192446.html?keyword=topstory.

to be successful. The Eastern Panhandle is booming, as residents and businesses find the area to be a pleasing alternative to the nation's capital.² Additionally, the City of Morgantown has been named a top "Small City" of the United States, making it a desirable location for new business.³ The City of Huntington recently served as the filming grounds to the blockbuster hit, *We Are Marshall*.⁴

As metropolitan areas in West Virginia grow, the State must find a way to harmonize its rural and urban lands. Many city-dwelling residents of the State welcome new opportunities, while numerous rural residents in the counties oppose metropolitan sprawl.⁵ These diverging perspectives become problematic when land developers attempt to plan and regulate land located on the borders of the city and county corporate limits.

Many states have successfully accommodated opposing land types by enacting laws allowing for extraterritorial jurisdiction ("ETJ") in land use planning.⁶ ETJ permits municipalities to regulate land beyond municipalities' corporate limits.⁷ ETJ is useful because it makes zoning and land regulation easier by ignoring rigid boundaries that were determined by legislative bodies over one hundred years ago, and instead placing flexible boundaries that consider how the land may be used in the future.⁸

Unfortunately, West Virginia is not as progressive as other states in the arena of land use planning.⁹ Noticing a need for change, the West Virginia Leg-

² See *infra* § VI. A; see also RICHARD A. BRISBIN, JR., ROBERT JAY DILGER, ALLAN S. HAMMOCK, & CHRISTOPHER Z. MOONEY, WEST VIRGINIA POLITICS AND GOVERNMENT 13 (1996).

³ *Best Small Town*, MEN'S JOURNAL, April 2004.

⁴ See *WE ARE MARSHALL* (Warner Bros. 2006) (Although much of the motion picture was filmed in Atlanta, many scenes were produced in Huntington, WV.).

⁵ See generally BRISBIN, JR., ET AL., *supra* note 2.

⁶ David E. Hunt, *The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities*, 45 U. CHI. L. REV. 151, 155 (1977) (arguing that nineteen states allow municipalities to exercise extraterritorial power in zoning). See e.g., ALA. CODE § 11-40-10 (2006); 65 ILL. COMP. STAT. 5/11-12-5 (2006); IOWA CODE § 414.23 (2006); MONT. CODE ANN. § 7-3-4444 (2006); NEB. REV. STAT. § 13-1111 (2006); N.M. STAT. ANN. §§ 3-21-2 and 3-21-3 (West 2006); N.C. GEN. STAT. § 160A-360(a) (2006); N.D. CENT. CODE § 40-47-01.1 (2006); TENN. CODE ANN. § 13-3-401 (2006); TEX. WATER CODE ANN. § 26.177(b) (Vernon 2006); WIS. STAT ANN. § 62.23(7) and § 236.45(3) (West 2006).

⁷ 5 EUGENE MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 15:28 (3d ed. 2004). For West Virginia law, see generally *Mineral County Court v. Town of Piedmont*, 78 S.E. 63 (W.Va. 1913).

⁸ See generally Elizabeth Howard, *Management of the National Grasslands*, 78 N. D. L. REV. 409, 424 (2002) ("Sound land management requires planning for land use based on resource location and terrain, not on the arbitrary and artificial boundaries of land ownership.").

⁹ 3 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 35:6, (4th ed. 2005) (Although not a comprehensive list, such states include Alabama, Arkansas, Cali-

islature made a long overdue amendment to the West Virginia Code in 2004 by repealing Chapter 8 and enacting Chapter 8A, one of the few revisions made in the field of land use planning in West Virginia since 1937.¹⁰ The purpose of Chapter 8A was to authorize planning commissions,¹¹ mandate comprehensive plans,¹² provide for subdivision or land development ordinances,¹³ and authorize boards of zoning appeals, among other goals.¹⁴ However, in this revision, the legislature failed to provide a section that would provide local governments with some type of extraterritorial land use authority.¹⁵

This Note urges the West Virginia Legislature to adopt a statute allowing for extraterritorial jurisdiction in zoning and subdivision regulation. Part II will explain how local governments are empowered by the state to control land use planning. Part III will explain the difference between extraterritorial jurisdiction and other actions municipal governments utilize to acquire land outside of their corporate limits. Part IV will explain why the West Virginia Legislature needs to enact an extraterritorial jurisdiction statute in Chapter 8A of the state code. Part V will provide data suggesting that trends in the laws of West Virginia support ETJ. Part VI will explain how ETJ could benefit growth in West Virginia. Finally, Part VII will address some of the concerns that arise when ETJ is applied and will discuss ways to remedy those concerns.

II. THE POWER OF LOCAL GOVERNMENTS IN LAND USE PLANNING

The United States Constitution does not mention local governments.¹⁶ Therefore, local governments cannot be created and cannot have any power, except as designated by its state government.¹⁷ This idea was made law in 1868 when the Iowa Supreme Court established Dillon's Rule.¹⁸ Under Dillon's Rule, the state legislature is recognized as having complete control over municipal

formia, Illinois, Iowa, Kentucky, Louisiana, Missouri, Nebraska, New Mexico, New Jersey, North Carolina, North Dakota, South Dakota, Tennessee, Texas, Utah, and Wisconsin.).

¹⁰ Prior to the enactment of W. VA. CODE §§ 8A-1-1, *et seq.* (2006), the only land use law in West Virginia was W. VA. CODE §§ 8-1-1, *et seq.*, which has been amended only one time since 1937. In 1969, W. VA. CODE § 8-1-1 was amended to change the name of the statute.

¹¹ W. VA. CODE § 8A-2-1.

¹² W. VA. CODE § 8A-3-1.

¹³ W. VA. CODE § 8A-4-1.

¹⁴ W. VA. CODE § 8A-8-1.

¹⁵ See W. VA. CODE § 8A-3-14. However, West Virginia did previously allow municipalities to plan and zone land outside of its corporate borders. See FRANK S. SENGSTOCK, EXTRATERRITORIAL POWERS IN THE METROPOLITAN AREA 62 n.196 (1962) (citing W. VA. CODE § 523 (1955) (repealed)).

¹⁶ McQUILLAN, *supra* note 7, at § 25.35.

¹⁷ *Id.*

¹⁸ Clay Wirt, *Dillon's Rule*, VIRGINIA TOWN & CITY, Aug. 1989, at 12-15.

governments, and local governments only have powers which are “(1) granted in express words; (2) necessarily implied or necessarily incident to the powers expressly granted; and (3) absolutely essential to the declared objects and purposes of the corporation.”¹⁹ In other words, if any ambiguity exists concerning which government has a certain power, Dillon’s Rule assumes that the state, not the municipality, has the power.²⁰

Local governments were not pleased with this lack of control over local affairs.²¹ They felt that state governments should not be able to control processes that more intimately affected communities than the state.²² Local governments recognized a need for change and therefore established the Home Rule.²³

A. *Home Rule*

Home Rule is “the transfer of power from the state to units of local government for the purpose of implementing local self-government.”²⁴ In most states, Home Rule allows municipalities to perform governmental functions without obtaining consent from the state legislation and without state interference.²⁵

Over forty states have adopted Home Rule provisions, but many states have implemented it differently.²⁶ Authorizing the citizens of a municipality to adopt a Home Rule charter through the state constitution is the most common way states implement the Home Rule.²⁷ After a charter is adopted, the state legislature delegates the chartered municipality all possible powers.²⁸

To counterbalance this broad constitutional grant of power, state constitutions also empower the legislatures to enact statutes that limit or prohibit the exercise of power by local governments.²⁹ Whereas under Dillon’s Rule it is assumed that a city does not have a particular power unless granted by the legislature, the opposite is generally true with Home Rule.³⁰ Under Home Rule, it is

¹⁹ Diane Lang, *Dillon’s Rule...and the Birth of the Home Rule*, THE MUNICIPAL REPORTER, Dec. 1991, at 3, available at www.nmml.org/Dillon.pdf.

²⁰ *Id.*

²¹ David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2281 (2003).

²² *Id.*

²³ Lang, *supra* note 19, at 5.

²⁴ *Id.*

²⁵ *Id.*

²⁶ U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, M-186, STATE LAWS GOVERNING LOCAL GOVERNMENT STRUCTURE AND ADMINISTRATION 19 (1993) (“[o]verall, forty states have laws on incorporation”), <http://www.library.unt.edu/gpo/acir/Reports/information/M-186.pdf>.

²⁷ Barron, *supra* note 21, at 2290.

²⁸ *Id.*

²⁹ Lang, *supra* note 19.

³⁰ *Id.* at 4.

assumed that a municipality has a power unless it is expressly denied by state statute or state constitution.³¹

B. West Virginia as a Home Rule State

West Virginia is one of the many states that follow the Home Rule provisions.³² The State provides the general laws for the incorporation and government of cities, towns, and villages.³³ The West Virginia Code has designated four types of cities: (1) a municipal corporation with a population over 50,000 is classified as a Class I city, (2) a municipal corporation with a population of 10,000 to 50,000 is a Class II city, (3) a municipal corporation with a population of 2,000 to 10,000 is considered a Class III city, and (4) a municipal corporation with a population of less than 2,000 is a Class IV town or village.³⁴ These classifications become important because a Class IV town or village does not have the authority to frame or adopt the charter of such a corporation.³⁵ On the other hand, a Class I, II, or III city may adopt the charter of such a corporation and may pass all laws and ordinances relating to its municipal affairs without any interference from the state.³⁶

C. Standard Zoning Enabling Act

Local governments in Home Rule states often use their law-making power to enact land use planning laws, such as zoning ordinances and subdivision regulations. However, because Home Rule gave municipalities so much freedom in enacting laws related to local affairs, there was no uniformity in zoning and subdivision regulation laws. Therefore, the United States Department of Commerce promulgated the Standard Zoning Enabling Act ("SZE") in the 1920s, and the states rapidly adopted it.³⁷

The SZE created a plan for local legislatures, including recommendations for dividing districts, adopting regulations, and appealing local government decisions.³⁸ The SZE was also the first legislation to address and encourage the use of a "comprehensive plan."³⁹ While the SZE encourages the adoption of a comprehensive plan, it does not mandate zoning; however, it does

³¹ *Id.*

³² W. VA. CODE § 8-1-1 (2006).

³³ W. VA. CONST. art. VI, § 39(a).

³⁴ W. VA. CODE § 8-1-3.

³⁵ W. VA. CONST. art. VI, § 39(a).

³⁶ *Id.*

³⁷ J. Celeste Sakowicz, *Urban Sprawl: Florida's and Maryland's Approaches*, 19 FLA. ST. U. J. LAND USE & ENVT. L. 377, 391 (2004).

³⁸ *Id.* at 391-92.

³⁹ *Id.* at 392.

require local governments that choose to zone to abide by the rules created by the state.⁴⁰ Additionally, by delegating zoning power to the local level, local governments are able to develop their community in their own self-interest, which can create regional problems.⁴¹

One common problem often encountered under the SZEa is the presence of incompatible uses on municipal borders. The creators of the SZEa anticipated this problem and included a provision that allows for municipal legislatures to control areas on the “fringes of the cities.”⁴² In other words, as far back as 1920, lawmakers realized that ETJ may be necessary for the orderly development of communities.⁴³ Therefore, while the SZEa did not specifically include an ETJ provision, it did suggest that states could later adopt one.⁴⁴ The creators of the SZEa decided that enacting ETJ legislation to solve problems concerning municipal boundaries is the best solution because courts usually decline to infer extraterritorial authority due to potential conflicts between city and rural zoning authorities.⁴⁵

III. THE TRUTH ABOUT EXTRATERRITORIAL JURISDICTION

With the exception of New England, most states today still experience new incorporations and annexations of land to existing municipalities.⁴⁶ There are several different processes a municipality may endure to take control over an area of land, ETJ, annexation, and concurrent jurisdiction are three of the most common.

A. *Extraterritorial Jurisdiction*

Generally, municipal ordinances only apply to the territory of the municipality by which they are enacted and have no force beyond it.⁴⁷ However, a number⁴⁸ of state legislatures have enacted municipal ETJ statutes,⁴⁹ which al-

⁴⁰ Beth Hibner, *Shaping Community Character Through Zoning*, IDEAS @ WORK, Nov. 2002, www.growingsensibly.org/cmapdfs/i@wv2n3.pdf.

⁴¹ *Id.*

⁴² U.S. Department of Commerce, A State Zoning Enabling Act, § 1 n.15a (“Some communities find it desirable to control the development of areas adjacent to the city’s limits-which, in many cases, are ultimately to become a part of that city. Where it is desired to control those ‘fringes of cities’ the legislature may grant such power to any community.”).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See generally *Town of Gulf Shores v. Lamar Adver. of Mobile, Inc.*, 518 So. 2d 1259 (Ala. 1987).

⁴⁶ RUTHERFORD H. PLATT, *LAND USE AND SOCIETY* 141 (1996).

⁴⁷ MCQUILLAN, *supra* note 7; see also *Mineral County Court v. Town of Piedmont*, 78 S.E. 63 (W.Va. 1913).

⁴⁸ PETER W. SALSICH, JR. & TIMOTHY J. TRYNIECKI, *LAND USE REGULATION* 359 n.234 (2d ed. 2003) (“In 1978, the Supreme Court noted that 35 states authorized local governments to exercise

low local governments to impose zoning restrictions and regulations on land outside of its territorial boundary.⁵⁰ States granting such power to its cities believe that allowing cities to anticipate portions of the unincorporated county that are urbanizing and bringing them under a set of urban standards is beneficial to economic growth.⁵¹ Additionally, persons living just on the inside of one municipal corporation are often more affected by the development of the neighboring municipality than they are by development in their own community.⁵² States also support municipal extraterritorial jurisdictional authority because cities usually only attempt to obtain extraterritorial jurisdiction over areas they plans to annex in the future; therefore, extraterritorial jurisdiction helps smooth the transition of bringing an unincorporated area up to city regulations.⁵³ Two common ways to create an ETJ statute is through “boundary jurisdiction” or “default jurisdiction.”

1. Boundary Jurisdiction

Boundary jurisdiction is implemented when the state legislature empowers municipalities to exercise jurisdiction over planning up to a fixed boundary beyond the municipal corporate limits.⁵⁴ Boundary jurisdiction is the most common way to implement ETJ.⁵⁵ Some states authorize municipalities to exercise regulatory control over land within a one-mile radius beyond their borders.⁵⁶ Other state statutes provide for subdivision regulation up to five miles beyond the city limits.⁵⁷

Similarly, a few states calculate the scope of the municipality’s extraterritorial zoning by population.⁵⁸ In North Dakota, for example, cities with a population of less than 5,000 have jurisdiction one-half mile beyond their borders, while cities with a population of 5,000 to 25,000 have jurisdiction extending one mile, and cities with a population over 25,000 have jurisdiction extend-

governmental powers beyond their boundaries.”); U.S. HOUSING & HOME FINANCE AGENCY, PLANNING LAWS (2d ed. 1958).

⁴⁹ See generally N.C. GEN. STAT. § 160A-360(a) (2006); TENN. CODE ANN. § 13-3-401 (2006); N.M. STAT. ANN. §§ 3-21-2 to -3 (West 2006).

⁵⁰ See generally *Town of Gulf Shores*, 518 So. 2d at 1259.

⁵¹ See generally *Apple Creek Township v. Bismarck*, 271 N.W.2d 583 (N.D. 1978).

⁵² John Freilich & Thomas Ragsdale, *Timing and Sequential Controls: The Essential Basis for Effective Regional Planning*, 58 MINN. L. REV. 1009 (1974); Louis Bartelt, *Extra-Territoriality in Zoning*, 32 NOTRE DAME L. REV. 367 (1957).

⁵³ Norman Williams, Jr. & John M. Taylor, *Legal Techniques to Implement Overall Community Design*, 7 AMERICAN LAND PLANNING LAW § 166:3 (2005).

⁵⁴ KENNETH H. YOUNG, ANDERSON’S AMERICAN LAW OF ZONING § 5.26 (4th ed. 1997).

⁵⁵ *Id.*

⁵⁶ See, e.g., N.C. GEN. STAT. § 160A-360(a) (2006).

⁵⁷ See, e.g., TENN. CODE ANN. § 13-3-401 (2006).

⁵⁸ See, e.g., N.M. STAT. ANN. §§ 3-21-2 to -3 (West 2006).

ing two miles.⁵⁹ Local governments find boundary jurisdiction helpful because it maintains a bright-line rule for boundaries so there is no confusion as to when a jurisdiction is overreaching its allotted power.⁶⁰

2. Default Jurisdiction⁶¹

Another way to implement ETJ is by allowing the municipality to control the use of land only if the county has no zoning.⁶² This type of ETJ is desirable because it eliminates land waste. Default jurisdiction forces a county to plan its land to avoid “losing” the area to a municipality that may choose to develop the land in a way that is incompatible with the land use goals of the county.⁶³ For example, Arizona provides that if any county does not have a county zoning ordinance applicable to the unincorporated territory, then the legislative body of a municipality may exercise zoning powers both to territory within its corporate limits and to that which extends a distance of three contiguous miles in all directions of its corporate limits and is not located in a municipality.⁶⁴

Whether ETJ is determined by boundary extension or through a default rule, it is unique in that the adjacent municipality claiming ETJ has full control over the land use and development of the fringe area. In other words, there is no need for mutual agreement between the two neighboring jurisdictions.

B. Annexation

Unlike ETJ, annexations require the annexee property owners or developers to agree to the annexation of their property.⁶⁵ Annexation is a formal act by which a municipality incorporates land within its dominion.⁶⁶ When the land of one municipality is annexed by another, the zoning or subdivision regulations of the former-owning municipality no longer apply; the annexed land is received as unzoned property.⁶⁷ The newly annexed property may now be zoned, but in

⁵⁹ N.D. CENT. CODE § 40-47-01.1 (2006).

⁶⁰ ZONING AND LAND USE CONTROLS, § 1.03 [7][i] (LexisNexis 2005).

⁶¹ For examples of default extraterritorial jurisdiction statutes see IND. CODE ANN. § 36-7-4-801 (LexisNexis 2006); IOWA CODE ANN. § 414.23 (West 2006); MINN. STAT. ANN. § 462.357 (West 2006).

⁶² See generally Roger A. Cunningham, *Land-Use Control—The State and Local Programs*, 50 IOWA L. REV. 367 (1965); SENGSTOCK, *supra* note 15, at 61. See also *Blanchard v. Show Low Planning & Zoning Comm’n*, 993 P.2d 1078 (Ariz. 1999).

⁶³ Cunningham, *supra* note 62, at 371.

⁶⁴ ARIZ. REV. STAT. § 9-462.07 (LexisNexis 2006).

⁶⁵ PLATT, *supra* note 46, at 142.

⁶⁶ BLACK’S LAW DICTIONARY 87 (7th ed. 1999).

⁶⁷ See *Burt v. Idaho Falls*, 665 P.2d 1075 (Idaho 1983); *Louisville v. Jefferson County Planning & Zoning Comm’n v. Fortner*, 243 S.W.2d 492 (Ky. 1951). See also *Grayson v. Birmingham*

the time that it takes to pass the new zoning ordinance, property owners may start using their property in a way that is inconsistent with the municipality's comprehensive plan.⁶⁸ This undesirable scenario⁶⁹ is exactly what ETJ helps to avoid.

If a state enables a municipality to exercise ETJ over contiguous, unincorporated land, then when the municipality annexes the area it will already be under the control of the municipality. Therefore, the land will already conform to the same regulations as all of the property within the corporate borders of the municipality.

C. *Concurrent Jurisdiction*

A common mistake is to confuse ETJ with "concurrent jurisdiction" or "joint jurisdiction."⁷⁰ Under this form, there may be two sets of applicable regulations formed by separate local governments, or more ideally, one set of regulations created as a joint effort by two separate jurisdictions.⁷¹ Concurrent or joint jurisdiction is becoming more popular because it helps eliminate incompatible uses and encourages intergovernmental relations.⁷² However, again unlike ETJ, concurrent jurisdiction requires mutual agreements between the two jurisdictions; therefore, it is not the best solution for planning on the adjacent fringes where the two jurisdictions have differing goals for land use development.

ham, 173 So. 2d 67 (Ala. 1963) (where a landowner obtained from a county a commercial classification of twenty lots, he had no vested right to the commercial use of his land after it was annexed by a city and rezoned for residential use).

⁶⁸ JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 3.12 (2003).

⁶⁹ The scenario is actually a real hazard that some states have addressed statutorily. See OHIO REV. CODE §§ 303.18, 713.14 (West 2006); CAL. GOV'T CODE § 65859 (West 2006).

⁷⁰ For an example of a joint jurisdiction statute, see S.D. CODIFIED LAWS § 11-6-12 (2006):

Following adoption of a comprehensive plan by the governing bodies, the city and county planning commissions may prepare zoning regulations for all property in the joint jurisdictional area consistent with the comprehensive plan. The regulations shall delineate the authority of the governing bodies over all zoning matters pertaining to the joint jurisdictional area. Such regulations may include relinquishment by the county of some or all of its zoning authority within the joint jurisdictional area. In those instances where a county has granted to a municipality sole zoning authority beyond said municipality's existing corporate limits.

⁷¹ ZONING AND LAND USE CONTROLS, *supra* note 60.

⁷² *Id.*

IV. THE WEST VIRGINIA LEGISLATURE NEEDS TO EMPOWER LOCAL GOVERNMENTS WITH EXTRATERRITORIAL JURISDICTION

West Virginia is comprised of small isolated municipalities surrounded by unincorporated land, most of which has no zoning. Such land composition is where ETJ is best implemented because the incorporated municipalities may grow without interfering with the land use plan of another metropolitan area.⁷³ Additionally, one of the purposes of ETJ is to solve jurisdictional conflicts between city and rural areas surrounding the city, where the urbanization of farm land is opposed and rural residents resist government restrictions on land use.⁷⁴ Such conflicts are apparent in West Virginia; landowners in the Eastern and Northern Panhandles are excited to expand their cities, while landowners in more rural counties do not want their land subjected to zoning regulations.⁷⁵ If the West Virginia Legislature fails to provide its cities with the ability to plan and zone outside of its corporate limits, then as the population of urban areas grow, the size of agricultural lands will dwindle, in which case land development within both the city and the county will suffer.⁷⁶

A. *Small Cities, Big Problems*

A big problem faced by smaller cities, is losing land development opportunities to adjacent, unincorporated county areas with less stringent regulations.⁷⁷ Many land developers have incentive to build on the fringe of the municipality because county governments are not typically responsible for urban development, and therefore do require the same costs as the city government.⁷⁸

⁷³ See BEVERLEY J. POOLEY, *PLANNING AND ZONING IN THE UNITED STATES* 23 (1982).

⁷⁴ FRANK E. HORACK, JR. & VAL NOLAN, JR., *LAND USE CONTROLS* 58 (Warren A. Seavey ed., 1955).

⁷⁵ See generally BRISBIN, JR., DILGER, HAMMOCK, & MOONEY, *supra* note 2.

⁷⁶ HORACK, JR., & NOLAN JR., *supra* note 74.

Unless [rural land] can be planned or zoned before it becomes developed, it will lose its agricultural characteristics without acquiring stable urban qualities. The consequences usually are that the city becomes obligated to provide streets and highways, municipal services, schools, recreation, police and fire protection, but the tax value of the land is not commensurate with the cost of services demanded. Industry may wish the land but it is already too far developed with residences to make profitable for industrial use. It is understandable, then, that the city feels that it can fairly claim the right to control and direct the development of the land adjacent to its boundaries.

Id.

⁷⁷ Laurie Reynolds, *Rethinking Municipal Annexation Powers*, 24 *URB. LAW.* 247, 252-253 (1992) ("Because of the frequent disparity between the level of city and county regulations, development in the county may be subject to less regulation and therefore cheaper to build.").

⁷⁸ *Id.*

West Virginia is not a stranger to this problem.⁷⁹ One need only to compare the platting procedure and approval process of Kanawha County to that of the City of Charleston to understand why a developer would prefer to develop in county territory rather than within the city limits.

The planning commissions of both Kanawha County ("County") and the City of Charleston ("City") have, pursuant to West Virginia Code Section 8A-5-1, adopted comprehensive regulations regarding the subdivisions of property. In both the City and the County, a subdivider must receive approval of the final subdivision plat before taking any action.⁸⁰ In both the City and the County, the subdivider must submit and receive approval of a preliminary plat.⁸¹ However, the County will accept a plat prepared by a registered land surveyor while the City requires that a registered professional civil engineer prepare the preliminary plat.⁸² Additionally, the County regulations list only eight⁸³ pieces of information that must be included with the preliminary plat, while the City requires thirteen.⁸⁴

After the preliminary plat is approved, the plat must still receive final approval. In the County, the original and four additional copies of the final plat must be submitted to the planning commission, while the City requires the filing of the original plus seven additional copies.⁸⁵ Another important difference between the City and County approval process is that only the City requires the subdivider to obtain a comprehensive insurance policy if the subdivision will contain more than five lots and is within 2,000 feet of a "built-up" area.⁸⁶ Fi-

⁷⁹ Interview with Chris Fletcher, Planning Director, The City of Morgantown (Feb. 15, 2007).

⁸⁰ DAVID G. HAMMOND, *NEGOTIATING THE MAZE OF LAND DIVISION REGULATION 5* (James D. Elliott ed., 1997).

⁸¹ *Id.* at 6.

⁸² *Id.* (explaining that the City requires a professional civil engineer because its "subdivision regulations are very specific as to matters such as the scale used in the plat").

⁸³ *Id.* at 7. The County requires: (1) the name of the subdivision; (2) the subdivision's location; (3) the name and address of the landowner; (4) a topographical map; (5) an accurate traverse of the subdivision boundaries; (6) total acreage, number of lots, and total acreage and length of streets; (7) the layout and identification of streets, alleys, easements, lots, and the like; and (8) the name and address of the surveyor or engineer who prepared the plat.

⁸⁴ *Id.* The City requires: (1) the name of the subdivision; (2) the tract designation of the subdivision; (3) the name and address of the owner, the subdivider, and the engineer who prepared the plat; (4) the location and names of adjoining subdivisions, a list of adjoining land owners, and an outline of all adjoining lands owned by the subdivider or the subdivision's owners; (5) the boundary lines of the subdivision tract; (6) the location, width and names of streets, public ways, pavement and all easements; (7) the location and features of existing and proposed sewers or sewerage facilities; (8) contours; (9) the layout, proposed names and widths of all proposed streets, public ways and easements, and the layout of proposed lots; (10) the zoning boundary lines; (11) all parcels intended to be dedicated or reserved for public use; (12) north-point, scale, and date; and (13) copies of any private restrictions, covenants or conditions proposed to be included in the deeds.

⁸⁵ *Id.* at 9.

⁸⁶ *Id.*

nally, only the City requires that the subdivider receive approval from the city engineer for the design of the streets and sidewalks of the subdivision and to control drainage and stabilize the soil during the construction of the subdivision.⁸⁷

Because the land development regulations of West Virginia's cities are much stricter than those of the state's counties, it is easy to see why a developer would choose to develop within county territory, yet on the fringe of the city. By developing on the border, the subdividers are able to reap all of the benefits of building in a city without adhering to the city's developing standards. By enacting an ETJ statute, the legislature could prohibit subdividers from taking advantage of the state's municipalities by having their proverbial cake and eating it, too.

B. *The Wal-Mart Dilemma*

A second reason the West Virginia Legislature needs to enact an ETJ statute is to enable municipal government to control the land that affects their citizens. As aforementioned, it is common that land located within the jurisdiction of the county but immediately outside of municipality's limits, more closely affects the citizens of the municipality than of the county.⁸⁸ The "Wal-Mart Dilemma" of 2000 proved this idea to hold true in West Virginia.⁸⁹

A few years ago, the WVU Foundation was willed forty-five acres of land to use for scholarships.⁹⁰ The land was adjacent to Route 705 but not within the city limits of Morgantown.⁹¹ The Foundation offered it to a developer, who in turn assigned the option on the land to Wal-Mart, which planned to build a "Supercenter" on the land.⁹² Because the proposed development was to occur on Monongalia County land, and not within the City of Morgantown borders, Morgantown residents and officials could not voice a formal opinion in the matter. This lack of input is disturbing because the possible Wal-Mart would have affected the city residents much more than the county residents.

A Wal-Mart on Route 705 would have created extra traffic on the already congested highway and would have resulted in a "nightmare" for Morgantown residents.⁹³ Additionally, Morgantown already accommodated a Super Kmart, whose business would most likely have decreased, and as a result, Kmart

⁸⁷ *Id.* at 10.

⁸⁸ *See supra* part III. A; *see also* Borough of Cresskill v. Borough of Dumont, 100 A.2d 182 (N.J. Sup. Ct. 1953).

⁸⁹ SprawlBusters, *Morgantown, WV. The University's Wal-Mart*, (Mar. 11, 2000), <http://www.sprawl-busters.com/search.php?readstory=407>.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* Monongalia County voted against the proposed Wal-Mart.

⁹³ *Id.*

employees, many of them city residents, may have lost wages or working hours, thus feeling the effects of the Monongalia County development.⁹⁴ Finally, the proposed Wal-Mart would have killed Morgantown's Main Street Program. Morgantown has been investing tax dollars in the Main Street Program to foster downtown business activity to achieve a more community feel and a less sprawl appearance.⁹⁵ The Wal-Mart would have encouraged more sprawl and drained revenue from downtown, making the program futile.

Clearly, Morgantown would have felt the repercussions from the proposed Wal-Mart development, but despite the possibility of this strong ripple effect, Morgantown leaders had no control over the matter because the Wal-Mart was located on county land. This "catch-22" can be avoided through ETJ. If an ETJ statute existed in West Virginia, then Morgantown would have been able to control the Wal-Mart deal and could have reached a resolution that would have fairly addressed the concerns of the city as well as the county.

V. WEST VIRGINIA LAND USE PLANNING TRENDS SUPPORT ETJ

While West Virginia expressly prohibits ETJ in land use planning,⁹⁶ the stated findings and purposes for land use planning delineated in Chapter 8A actually support ETJ. The West Virginia Legislature recognizes that the "problems of growth and development so transcend the boundary lines of governmental units that no single government can plan for the solution of these problems without affecting other units of government."⁹⁷ The legislature has also stated that regional intergovernmental cooperation is an effective way to approach common planning and development problems.⁹⁸ Finally, the legislature has recognized that governing bodies of municipalities and counties need flexibility when authorizing land development and use.⁹⁹ With these acknowledgments in mind, authority for ETJ in zoning and subdivision regulation seems like the next logical step West Virginia will take in land use planning.

In addition to including purposes and findings consistent with ETJ, the West Virginia Legislature has enacted certain statutes that are consistent with ETJ. First, the West Virginia Code has includes a section allowing for annexation, a power relating to extraterritorial jurisdiction.¹⁰⁰ Second, the legislature now permits the use of extraterritorial jurisdiction for utilities and financing,

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ W. VA. CODE § 8A-3-14 (2006) ("The jurisdiction of a municipal planning commission shall not extend beyond the corporate limits of the municipality.").

⁹⁷ W. VA. CODE § 8-25-1.

⁹⁸ *Id.*

⁹⁹ W. VA. CODE § 8A-1-1(a)(9).

¹⁰⁰ W. VA. CODE § 8-6-1; *see also supra* part III. B.

which proves that the lawmakers have realized that boundaries are artificial.¹⁰¹ Third, the West Virginia Code recommends that municipalities form joint-planning commissions, proving that West Virginia recognizes that it is sometimes necessary for two different jurisdictions to work together to achieve a common goal in land use.¹⁰²

A. *Annexation*

As aforementioned, annexation is often directly associated with ETJ.¹⁰³ ETJ simply allows a city to control the zoning and subdivision regulations outside the city boundaries, as where annexation actually takes land outside of the city boundary and incorporates it, forcing it to become part of the city.¹⁰⁴ Generally, annexation is more severe and permanent than extraterritorial jurisdiction because it causes cities to extend their municipal services, regulations, voting privileges, and taxing authority to new territory.¹⁰⁵ Therefore, it is ironic that the West Virginia Legislature allows for annexation, a permanent and invasive procedure, but not for ETJ.

By allowing for annexation, the West Virginia Legislature recognizes that existing boundaries of the municipalities are sometimes not the most logical or convenient. Therefore, municipal authority for ETJ seems like a logical power to instill on local governments. Rather than forcing the local government to actually take over the contiguous land by annexation, the legislature could simply give the adjacent municipal governments the power to plan how the unincorporated land may be developed. This solution would appease the residents of the unincorporated land because they would not be subjected to complete city control, and the residents within the city boundaries would also approve because their development would not be hindered by the artificial boundaries. Because West Virginia allows for annexation, and because ETJ is usually a stepping-stone in the annexation process, the West Virginia Legislature should empower local governments with the right to utilize ETJ.

B. *Extraterritorial Jurisdiction for Public Works and Financing.*

The West Virginia Legislature permits ETJ for public works and finance.¹⁰⁶ Under Section 8-16-25 of the West Virginia Code, municipalities have the authority to construct, acquire, and operate all public works, and may issue

¹⁰¹ W. VA. CODE § 8-16-25.

¹⁰² W. VA. CODE § 8A-2-5.

¹⁰³ See *supra* part III. B.

¹⁰⁴ See generally *Town of Gulf Shores v. Lamar Adver. of Mobile, Inc.*, 518 So. 2d 1259 (Ala. 1987).

¹⁰⁵ See generally POOLEY, *supra* note 73.

¹⁰⁶ W. VA. CODE § 8-16-25.

and sell bonds to finance such projects. Municipalities may exercise such authority for up to ten miles outside of its corporate limits.¹⁰⁷

Because the legislature approves of ETJ for public works and financing, it is clear that the trend in West Virginia is to move away from artificial boundaries. The state legislature is in essence admitting that local governments are often most aware of where boundaries should be placed. Thus, local governments should draw them.¹⁰⁸

Also, by allowing municipalities to exercise jurisdiction up to ten miles outside of its boundary, the legislature made it clear that there are no “set” boundaries, and that under certain circumstances, it would be best to remove artificial boundary lines.¹⁰⁹ Additionally, by allowing municipalities to control the public works and financing outside their jurisdiction, it is clear that the legislature believes that intergovernmental relations may be the best way to control land. In general, the legislature’s approval of ETJ in public works and financing serves as evidence that West Virginia is moving in the direction of blurred boundaries. Therefore, the State should approve of ETJ in zoning and subdivision regulation.

C. *Joint Planning Commissions*

Additional evidence that the West Virginia Legislature supports municipal authority for ETJ in zoning and planning exists in state legislation that authorizes the use of joint planning commissions.¹¹⁰ Under West Virginia law, municipalities and counties may create a planning commission to promote the orderly development of its jurisdiction.¹¹¹ Planning commissions serve in an advisory capacity to the governing body that created it and have certain regulatory powers over land planning.¹¹² The planning commission’s purpose is to ensure that the community’s goals for land use planning are being met. If the identified goals are not met, the planning commission, with citizen input, should come up with a way to meet these goals.¹¹³

¹⁰⁷ *Id.*

¹⁰⁸ For a discussion of artificial boundaries, see POOLEY, *supra* note 73, at 29 (citing *Valley View Village, Inc. v. Proffett*, 221 F.2d 412 (Ohio 1955)) (“The court here is looking beyond the make-believe boundaries of political units of government and allowing municipalities to take into consideration the needs and potentialities of the entire urban or geographic unit of which it may be a part.”).

¹⁰⁹ *Id.*

¹¹⁰ W. VA. CODE § 8A-2-5.

¹¹¹ W. VA. CODE § 8A-1-1(b)(2); *see supra* part III. C. (joint-planning commissions are often compared to governmental bodies engaged in joint jurisdiction planning).

¹¹² *Id.*

¹¹³ W. VA. CODE § 8A-1-1.

Here again, the legislature, in realizing that boundaries are artificial, created a provision allowing for joint planning commissions so that lawmakers from several jurisdictions can work together to devise and achieve common goals in land use planning.¹¹⁴ Joint planning commissions are comprised of five to fifteen members, all of whom must be residents of the represented jurisdictions, and must fairly represent different areas of knowledge and expertise in business, labor, farming, government, and other relevant disciplines.¹¹⁵ Additionally, to ensure impartiality, each governing body participating in the joint planning commission must have one member from its governing body on the planning commission.¹¹⁶ To be sure that each governing body is fairly represented, the members of the joint planning commission must equally represent the jurisdictions in the planning commission.¹¹⁷

Enacting such legislation proves that sometimes a governing body's goals may only be achieved by working with the governing bodies of other areas. This is one of the purposes of ETJ. Therefore, because the legislature recommends that two governing bodies work together to achieve common land use planning goals, it is likely that the legislature would be open to adopting an ETJ statute.

On the other hand, opponents of an ETJ statute may argue that although Chapter 8A allows for joint planning commissions, that same chapter clearly states that the jurisdiction of a municipality may not extend beyond its corporate limits.¹¹⁸ Therefore, the legislature purposely included this provision because it did not want to allow for ETJ in land use planning.

However, lawmakers included an "intergovernmental cooperation" provision in Chapter 8A, which suggests that land development goals would be best achieved by the input of different governing bodies.¹¹⁹ The intergovernmental cooperation states:

With a view to coordinating and integrating the planning of municipalities and/or counties with each other, all governing bodies and units of government within the lands under the jurisdiction of the planning commission preparing or amending a comprehensive plan, all governing bodies and units of government *affected* by the commission, must cooperate, participate,

¹¹⁴ W. VA. CODE § 8A-2-5.

¹¹⁵ *Id.* § 8A-2-5(2)(d).

¹¹⁶ *Id.*

¹¹⁷ *Id.* § 8A-2-5(2)(e).

¹¹⁸ W. VA. CODE § 8A-3-14.

¹¹⁹ W. VA. CODE § 8A-3-13.

share information and give input when a planning commission prepares or amends a comprehensive plan.¹²⁰

The use of word “affected” means a great deal in this statute. The legislature could have simply restricted input to those governments within the lands of the jurisdiction. However, the legislature realized that landowners outside of the boundaries may be affected by the comprehensive plan and therefore they should get to express an opinion as to how goals should be accomplished.¹²¹

The legislature’s reasoning applies to ETJ in land use as well. If West Virginia lawmakers believe that outside governments affected by a comprehensive plan have a right to voice their opinions, then it follows that outside governments affected by zoning restrictions and subdivision regulations of a contiguous municipality should have a right to input as well. The West Virginia Legislature already supports intergovernmental cooperation and ETJ is only an extension of that policy.

VI. IMPLEMENTING EXTRATERRITORIAL JURISDICTION IN WEST VIRGINIA

As aforementioned, West Virginia currently is a “Home Rule” state, and generally “Home Rule” states have greater autonomy than states that have not adopted Home Rule.¹²² However, unlike many Home Rule states, West Virginia has yet to take advantage of this local autonomy by adopting an ETJ statute.¹²³ The West Virginia Legislature needs to enact an ETJ statute because many of the metropolitan areas of West Virginia are experiencing great economic growth, and to effectively develop, the cities must be able to plan land outside of the metropolis areas.¹²⁴

¹²⁰ *Id.* (emphasis added).

¹²¹ The idea that landowners not living within a municipality’s jurisdiction, will still be affected by that municipality’s land use decisions is widely accepted. *See* *Holt Civic Club v. City of Tuscaloosa*, 439 US 60 (1978); *Borough of Cresskill v. Borough of Dumont*, 100 A.2d 182 (N.J. Sup. Ct. 1953) (“It is almost inevitable that an adjoining municipality will be affected in some degree by the zoning regulations along its border adopted by its next door neighbor.”).

¹²² *See supra* part II. A.

¹²³ Land use planning is not the only area where the legislature has failed to provide its local governments with more control. *See* Kenneth A. Klase, *West Virginia*, in *HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK* 445 (Dale Krane, Platon N. Rigos, & Melvin B. Hill, Jr. eds. 2001); *BRISBIN JR., DILGER, HAMMOCK, & MOONEY, supra* note 2, at 63.

¹²⁴ *See* Reynolds, *supra* note 77 (explaining that if a municipality is unable to control land development on the outskirts of its jurisdiction, then the municipality will stagnate); DAVID RUSK, *CITIES WITHOUT SUBURBS* 9 (2d ed. 1995) (“For a city’s population to grow, the city must be ‘elastic.’ Think of a city as a map drawn on a rubber sheet. To accommodate new growth...[the city] must stretch the edges of its rubber sheet map to take in new territory.”); RICHARD M. YEARWOOD, *SUBDIVISION REGULATION: POLICY AND LEGAL CONSIDERATIONS FOR URBAN PLANNING* 7 (1971) (discussing the undesirable consequences of uncontrolled growth include traffic congestion, sprawling shopping centers, tax problems, and decreased property values).

A. *A Boundary Jurisdiction Statute in West Virginia*

The West Virginia Legislature may be hesitant to adopt an ETJ statute because it might believe that because West Virginia is a small, rural state, ETJ is not needed.¹²⁵ However, Wisconsin, like West Virginia, is a mostly rural state with few major cities, yet it still finds ETJ to be useful in land use planning. Therefore, it would be wise for West Virginia to look to Wisconsin, a similarly situated state that has successfully enacted an ETJ statute, to determine which type of ETJ would be appropriate or how the statute should be implemented.

In Wisconsin, the City of Sun Prairie (“City”) exercises extraterritorial powers of subdivision regulation and zoning review.¹²⁶ The City is bordered by the towns of Sun Prairie, Bristol, Burke and Windsor, and the city’s ETJ extends into each of these towns.¹²⁷ The City has the authority to review all proposed land divisions (subdivision plats or certified survey maps) up to a three-mile radius into each adjacent town.¹²⁸ For example, if one of the neighboring towns wishes to develop property that falls within the ETJ area, an application must be submitted to the City for review and approval, in addition to the review typically conducted by the appropriate town and county governments.¹²⁹

West Virginia could greatly benefit from an ETJ statute similar to Wisconsin’s. To illustrate why an ETJ statute would help West Virginia, it is useful to look at the development of the Eastern Panhandle. Because of its strategic location and quick access to a full range of major transportation facilities, local and state governments set forth an aggressive campaign to attract new business to the Eastern Panhandle and to support existing firms.¹³⁰ International and domestic companies such as General Motors, Ecolab, Orgill, and DuPont noted the advantages and opportunities of developing in the Eastern Panhandle of West Virginia and have opened offices there.¹³¹ As a result of the business develop-

¹²⁵ In fact, the opposite is true. See POOLEY, *supra* note 73.

But the usefulness of [extraterritorial zoning power] in metropolitan areas is very small; most metropolitan areas consist of one or more municipalities in a densely populated area. In most cases, the municipalities, which form a part of such area are islands—or at best, peninsulas—in a sea of incorporated territory. Clearly to give municipalities the power to zone effectively in one another’s territory would defeat the whole purpose of local government and lead to anarchy.

Id.

¹²⁶ City of Sun Prairie, Planning and Economic Development – Zoning & Development, <http://www.cityofsunprairie.com> (follow “Departments” hyperlink; then follow “Planning” hyperlink; then follow the “Zoning and Development” hyperlink) (last visited Feb. 10, 2007).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Berkeley County Development Authority, available at <http://www.developmentauthority.com> (last visited Feb. 17, 2007).

¹³¹ *Id.*

ment, the population in the Eastern Panhandle is booming as well. For example, from 1990 to 2000, the population in Berkley County increased by 28.1%, and then in the four years from 2000-2004 its population increased again by 17.8%.¹³²

When considering the growth of the Eastern Panhandle, it would make sense for West Virginia to enact an ETJ statute that permits a city to control the land to a fixed distance beyond its boundary. If such a statute existed, cities such as Martinsburg and Charles Town could better develop the area because their land use decisions would not be restricted by artificial boundaries created by the state. These cities could control the land of neighboring towns to assure that the plans a town makes for its own land does not conflict with the developmental scheme of larger cities.

B. *A Default Jurisdiction Statute in West Virginia*

If the legislature feels as though the “boundary jurisdiction” ETJ statute would be giving cities too much control over land outside of its boundaries, it could make the statute even more restrictive by only allowing a city to zone the land of unincorporated areas where the county has not enacted any zoning, or allow for “default jurisdiction.” To implement such a statute, the legislature could look to a fellow Fourth Circuit state, such as North Carolina, for guidance.¹³³

The Town of Maggie Valley, North Carolina enacted an ordinance that permits the town to plan and develop regulations affecting land surrounding its corporate limits for a distance of not more than one mile in Haywood County, so long as the area is not within the jurisdiction of any other town.¹³⁴ In other words, Maggie Valley may regulate land in Haywood County so long as the Haywood County does not enact its own zoning ordinance. Maggie Valley found it necessary to enact such an ordinance because the area one mile outside of Maggie Valley consists of existing or projected urban development and is of critical concern to the Town.¹³⁵

Enacting an ETJ statute that allows for default jurisdiction would be advantageous to the land use planning goals of West Virginia.¹³⁶ To illustrate how default jurisdiction could benefit West Virginia, one need only look to the land

¹³² *Id.*

¹³³ Land use development in North Carolina is similar to West Virginia in that many of the larger cities in North Carolina have adopted zoning, but the counties in North Carolina remain largely uninvolved in development planning and regulation. See David W. Owens, *The North Carolina Experience with Municipal Extraterritorial Planning Jurisdiction*, UNIV. OF N.C. SCHOOL OF GOVERNMENT SPECIAL SERIES NO. 20 (Jan. 2006).

¹³⁴ Town of Maggie Valley, N.C. Ordinance 279 (May 21, 2002), available at http://www.townofmaggievalley.com/ordinances/Ord279ETJ_recreation14A6C.htm.

¹³⁵ *Id.*

¹³⁶ See W. VA. CODE § 8A-1-1.

use planning in Monongalia County. Monongalia County includes the City of Morgantown, which is the home of West Virginia University. As a result of the University's presence, Monongalia County must not only plan for its permanent residents, but for the student population as well. The University recently admitted its largest freshman class ever.¹³⁷ This growth in population increases the need for orderly development. Shopping centers, restaurants, coffee shops and housing complexes are being built at rapid speeds.¹³⁸ However, outside the City of Morgantown is unincorporated rural land controlled by Monongalia County, which is much more rural than the land inside the city limits. Because Morgantown has no authority to control any land outside of its jurisdiction, there is an abrupt change of land use between the developed land in the city boundary and the farmlands of the county.

An example of this harsh transition is apparent on Route 705.¹³⁹ The portion of Route 705 that is located within Morgantown City limits has been commercially developed and includes businesses such as Sheetz, Healthworks, Hardees, and Walgreens. However, a short distance away on the same stretch of Route 705 is beautiful countryside. While both business and rural land uses are crucial to the growth of the state, these borders are unnatural and not aesthetically pleasing. According to Monongalia County's new land use ordinance, one of its goals is to resolve such incompatible land uses in order to improve the design and quality of the land.¹⁴⁰ These stated goals would be best advanced if the state allowed Morgantown to utilize default jurisdiction.

Currently, the County has utilized the new statute by zoning the land surrounding Cheat Neck community, including Cheat Lake, Coopers Rock State

¹³⁷ Press Release, West Virginia University, WVU enrollment tops 26,000; freshman academic profile remains strong, (Oct. 26, 2005), *available at* http://www.nis.wvu.edu/2005_Releases/fall_enrollment.htm ("The record 26,051 enrollment marks the fifth consecutive year of growth for the University and a 3.2 percent increase from the fall 2004 enrollment of 25,255.").

¹³⁸ Since 2004, developers have built a Starbucks, Inc., Chic-Fil-A, Inc., Qdoba, Inc., and The District Apartments, L.L.C., among others.

¹³⁹ Chris Fletcher, Director of Planning, Monongalia County Planning Commission, Presentation at the West Virginia University, College of Law Land Use Planning Class (Oct. 6, 2005).

¹⁴⁰ Monongalia County, W.Va., Zoning Ordinance for the Zoned Planning Districts of Monongalia County, West Virginia, Art. 100, *available at* http://moncpc.org/cn_zoning_web_pdfs/Article_100_Enactment_&Scope_Version_1.0.pdf. (last visited Mar. 4, 2006)

(1) encourage compatibility between different land uses and protect the character, scale and stability of existing residential, institutional, business, industrial and natural areas from the encroachment of incompatible uses and (2) establish reasonable standards of design and procedures for development to further the orderly, responsible and beneficial layout and use of land that is economically sound, environmentally friendly, supportive of community livability, and enhances quality of life.

Id.

Forest, and Chestnut Ridge Regional Park.¹⁴¹ However, the County has not created a plan for the land immediately bordering the City of Morgantown, more specifically the aforementioned area on Route 705.¹⁴² Although default jurisdiction usually only applies when the county has not enacted any zoning ordinance, it can also be used in areas where the county has simply failed to zone. Therefore, because Monongalia County has chosen not to zone land contiguous to Morgantown's city limits, Morgantown should be able to exercise default jurisdiction. The City could maintain the rural feel of the county territory but make smoother transitions by planning for compatible uses on the border.

VII. CONSTITUTIONAL CONCERNS

A major reason that some states are hesitant to pass ETJ statutes is because the constitutionality of such legislation is often challenged. Citizens usually complain because they fear ETJ will allow the government to "take" their land, or because they are being controlled by a government that they did not elect.

A. *Violation of the Takings Clause*¹⁴³

A common complaint of ETJ is that it unfairly "takes" property away from its rightful owner, namely private individuals who have been controlling the land for years, sometimes centuries. This complaint is best illustrated in a letter sent to a local government in North Carolina, which utilized North Carolina's ETJ statute to zone rural land located on the adjacent fringes of the city and county limits:

I am very upset and disappointed at the idea of ETJ!

My dad bought this property...loved it and took care of it for almost 50 years. My childhood memories include walking over the mountain to pick wild strawberries.

My adult sons have fond memories of being here with their special granddaddy and want to bring their future children here. Upon my death, I want my ashes scattered here.

My family has owned this property for over 50 years, paid our taxes and supported [the community] in every way possible. We

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"). See also *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Takings Clause was designed to bar the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

have owned this before some of you were born and definitely longer than some of you have lived here.

It is not fair for you to change the land use after we have been the sole owner for all these years!

How would you like it if you lived and loved your land, and then someone changed the rules?¹⁴⁴

The property owner's concerns could be resolved through a grandfather clause exception to the ETJ statute. A grandfather clause is a provision exempting persons or other entities already engaged in an activity from rules or legislation affecting that activity.¹⁴⁵ A grandfather clause could be implemented in ETJ statutes by including an exception for landowners who are currently using their land in accordance to the city's comprehensive plan. In other words, if a private landowner living in county land that the city is planning to zone is using his land in accordance with the city zoning regulations, then the city should not be able to change the land use of the private owner.

B. *Violation of Voting Rights*

A second unfounded fear of ETJ is that it strips citizens of their right to vote for the local officials governing them. In Illinois, a township and its citizens filed a complaint against a neighboring municipality, alleging that the municipality's exercise of extraterritorial zoning violated the plaintiffs' voting rights because they were not allowed to vote for officials who adopt, amend, and administer the municipality's zoning ordinance.¹⁴⁶ In holding that the plaintiffs' voting rights were not violated, the Illinois Supreme Court relied on a similar United States Supreme Court case, *Holt Civic Club v. City of Tuscaloosa*.¹⁴⁷

In *Holt Civic Club*, the plaintiffs challenged the constitutionality of a statute that extended the jurisdiction of police powers a mile and a half outside of the municipality.¹⁴⁸ The plaintiffs, who were voters living in the one and a half-mile area, claimed they were being governed by policies enacted by officials for whom they had no opportunity to vote.¹⁴⁹ The United States Supreme Court, with the Illinois court following, held that no constitutional infraction

¹⁴⁴ Letter to the Editor, *More Residents' Reactions to Extraterritorial Jurisdiction*, THE HIGHLANDER (Highlands, N.C.), Oct. 28, 2005, available at http://www.highlandsnews.com/articles/2005/10/28/mountain_views/letters_to_the_editor/01letter.txt.

¹⁴⁵ BLACK'S LAW DICTIONARY 534 (8th ed. 2004).

¹⁴⁶ *The Town of Northville v. Village of Sheridan*, 655 N.E.2d 22 (Ill. App. Ct. 1995).

¹⁴⁷ 439 US 60 (1978).

¹⁴⁸ *Id.* at 63.

¹⁴⁹ *Id.*

occurred because every decision made by a city will likely affect those living outside the city to some extent. However, that affect does not require that those living outside the city be allowed to vote in city elections.¹⁵⁰

The same is true with regard to neighboring states. If the State of Indiana decides to build an airport one mile from its boundary with the State of Illinois, there can be no doubt that Illinois residents will be affected by the existence of the airport. That does not translate, however, into allowing Illinois citizens to vote in Indiana elections.¹⁵¹

Because other state and federal courts have deferred to the legislature and found no credible constitutional claims, it is unlikely that a West Virginia court would invalidate an ETJ statute.

VIII. CONCLUSION

State governments have given local governments the power to control municipal affairs. To further empower local governments, many states have enacted extraterritorial jurisdiction statutes, which give municipalities the authority to regulate zoning restrictions and subdivision regulation on land outside of its territorial boundary. States grant such power to their cities because allowing cities to anticipate portions of the unincorporated county that are urbanizing and bringing them under a set of urban standards is beneficial to economic growth.

Cities in West Virginia are currently experiencing great economic growth. However, because the cities lie in the middle of rural land controlled by counties, their potential development is restricted. Therefore, the West Virginia Legislature needs to step in and follow the trend set by other Home Rule states by enacting an ETJ statute.

An ETJ statute in West Virginia would be consistent with the direction of the West Virginia Legislature. The trend in West Virginia is towards joint planning and joint services, and the legislature has been encouraging intergovernmental relations. Therefore, ETJ in zoning and subdivision regulation is the next logical step to keep West Virginia a progressive state in land use planning. If the state continues to hinder the growth of its cities, there will never be a central metropolitan area and the state will continue to experience economic difficulties.¹⁵²

¹⁵⁰ *Town of Northville*, 655 N.E.2d at 25.

¹⁵¹ *Id.*

¹⁵² See BRISBIN, JR., DILGER, HAMMOCK, & MOONEY, *supra* note 2, at 16.

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